

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

B. M. PHELPS and ALICE E. PHELPS, Appellants,

v.

FLOYD HANSON, EZRA HANSON, SARA HANSON and
EVA M. HAMMOND, Appellees

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
MONTANA, BILLINGS DIVISION

Appellants' Reply Brief

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FURTHER STATEMENT OF FACTS

The statement of facts contained in appellants' opening brief (pp. 3-7) and in brief for appellees (pp. 1-5) contains the essential facts involved in this litigation. The appellees, however, have in their brief (p. 35) cast a criticism on counsel for the appellants by indicating that the cause now here was first filed in the State court and later by this counsel dismissed and the action brought in the District

Court of the United States for Montana. A further statement of fact, therefore, seems appropriate to remove from this Court's mind the impression that counsel for appellants have instituted two actions, one in the State court and later upon its dismissal one in the District Court of the United States for Montana. The action was originally brought by the present appellants by counsel of R. C. Stong, now deceased, practicing attorney of the city of Billings, Montana, prior to his death. After Mr. Stong's death, the present counsel was employed by the appellants, who, upon a review of the facts involved, determined that the action should have been properly brought in the District Court of the United States for Montana. The present counsel for appellants, therefore, dismissed the action then pending in the State court and by the present action sought the forum of the United States courts rather than of the State court for the reason that a controversy existed concerning the interpretation of the Crow Treaty, which was a matter not properly subject to determination in the State court.

ARGUMENT

(A)

A matter in controversy arising under the Crow Treaty of May 7, 1868 is stated in the amended complaint and does appear in the record here.

The appellees, both in their brief in support of their consolidated motion to dismiss the amended complaint of plaintiffs and in their brief upon appeal from the District Court of the United States for the District of Montana,

have tried to escape the jurisdiction of the courts of the United States by eliminating from its determination the rights of the plaintiffs arising under the Crow Treaty. In support of appellees' argument they have confused the issue by attempting to compare plaintiffs' rights under the Crow Treaty with any land owner's rights arising under title based on patent issued by the United States pursuant to the homestead laws of the United States. Such comparison with plaintiffs' rights to the use of water for the lands owned by the plaintiffs, based on a priority contemporaneous with the date of the Crow Treaty, May 7, 1868, is not justified under the existing statutes enacted by the Congress relating to lands and water rights within the Crow Reservation and those relating to lands commonly termed as "public domain." The United States when it issues a patent pursuant to an act of Congress is by such act relinquishing all rights of the United States to patentee. **Los Angeles Farming Co. v. Los Angeles**, 30 S. Ct. 452; 217 U. S. 217; 54 L. Ed. 736. The cases cited by appellees in support of their contention that the question involved herein is similar to land titles derived by Acts of Congress are all founded on the premise that the United States having once held title does not present a Federal question. Appellants have no dispute with appellees on that contention and are not urging that the fact that the United States once held title to these water rights in and of itself creates a Federal question. Appellants do urge, however, that the rights under the Crow Treaty conveyed to them upon acquisition of the fee title to the land are now available to establish

their priority as against appellees, and the interpretation of said treaty, where it conflicts with state law does present a real Federal question establishing jurisdiction before the courts of the United States.

In the case of **Norton v. Larney**, 266 U. S. 511; 69 L. Ed. 413, the court was confronted with the proper construction to be placed on a treaty with an Indian tribe. It was found to present a Federal question sustaining the jurisdiction of the courts of the United States.

The United States in approving the Crow Treaty of May 7, 1868 and by the subsequent adjudicated case of the **United States v. Powers**, 59 S. Ct. 344; 305 U. S. 527; 83 L. Ed. 330, has recognized and reaffirmed the reservation of waters essential for cultivation of the reserved lands for the benefit of the owners of such lands. The purpose of plaintiffs' action was to quiet title in their names to the waters necessary for the irrigation of 150 acres of the lands described in the amended complaint. (R. 3-4.) In quieting title to these water rights it is essential that plaintiffs rely on the strength of their own title and not on the failure of an adversary's title. In order to justify plaintiffs' cause of action they must interpret the Crow Treaty of May 7, 1868 as reserving to the owners of the lands included within the reservation all of the waters to be beneficially used thereon. The controversy that arises in connection with the interpretation of the Crow Treaty as between appellants and appellees is the establishment of appellants' priority of 1868 without benefit of or reliance upon the applicable statutes of Montana relating to water rights. Ap-

pellees' rights to the use of the waters sought to be quieted in plaintiffs by their amended complaint must arise under the laws of the state of Montana. Appellants, on the other hand, by this action do not resort to the state statutes and if forced to attempt to quiet their title in the State court would be before said court without benefit of state statutes but placing reliance upon their rights as reserved to them under the Crow Treaty. The State court can, therefore, properly dismiss their action because of the controversy between appellants and appellees based on the interpretation of the Crow Treaty. In the case of **Anderson v. Spear-Morgan Livestock Company**, et al., 79 P. 2d 667; 107 Montana 18, decided by the Supreme Court of the State of Montana, May 23, 1938, a somewhat similar factual situation existed. In that case, however, an adjudication of all the right to the use of water on a certain stream was sought. Some of these lands were patented lands within the Crow Indian Reservation and derived their right to the use of water from the Crow Treaty of May 7, 1868. Title being in the United States to some of the riparian lands, the court held the United States was an essential party. Adjudication proceedings instituted under Chapter 81 of the Revised Codes of Montana, 1935, require a determination of the rights of all owners of land on the stream to be effective. Therefore, the United States, being an owner, was an indispensable party, and no consent to be sued being shown the action was dismissed. In this case appellants are not seeking an adjudication of their rights under state law, but seek to quiet title as against appellees. The important

analogy is the language of the Court in the Anderson case wherein it states:

“The federal government, having reserved these waters on the reservation was the owner of them and it was unnecessary for it to make an appropriation of these waters.”

And further:

“When the allottee became seized of fee simple title, after the removal of the restrictions of the trust patent, then a conveyance of the land, in the absence of a contrary intention, would operate to convey the right to use the water as an appurtenance.”

The analogy here is that appellants are entitled to the advantage of the priority established by the 1868 Treaty, and penalized if a subsequent appropriator under state law can maintain in the state court an action barring appellants from invoking the rights they have by virtue of the Crow Treaty. This is manifestly a controversy based on the interpretation of a treaty as contemplated to confer jurisdiction on the United States courts.

There is further support for this in the case of **United States v. McIntire**, 101 F. 2d, 650, wherein the court stated:

“Likewise, the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation.”

(B)

The value of the matter in controversy exceeds Three Thousand Dollars (\$3000.00) exclusive of interest and costs.

The appellees in their brief (pp. 27-34) have attacked appellants' allegation in their amended complaint (R. 2) “that the value of the matter in controversy exceeds, exclusive of costs, the sum of \$3000.00.” Section 41 (1) (a)

(Judicial Code, Section 24) grants the District Courts original jurisdiction “where the matter in controversy exceeds exclusive of **interest** and costs the sum or value of \$3000.00.” Appellants’ amended complaint (R. 2) omits the word “interest.” The Appellees in their consolidated motion to dismiss (R. 22-27) have sought dismissal of the amended complaint for the reason that the matter in controversy does not exceed \$3000.00, and have asserted in support thereof that the matter concerns a value not greater than \$50.00 or \$500.00. By said assertion appellees waived their objection to appellants omission of the word “interest” in their allegation of their amended complaint. The Court in its decision (R. 36-37) attempts to determine that the matter in controversy does not exceed the value of \$3000.00. The elimination of the word “interest” therefore is not pertinent to the matters involved in this appeal. In support of the Court’s dismissal of plaintiffs’ amended complaint the Learned Judge relied in part on the fact that the matter in controversy did not exceed \$3000.00. In support of his justification for dismissal the Court cited the case of *KVOS, Inc. v. Associated Press*, 299 U. S. 269; 81 L. Ed. 183; 57 S. Ct. 197, and also the case of *McNutt v. General Motors Corp.*, 298 U. S. 178; 56 S. Ct. 780; 80 L. Ed. 1135. A careful analysis of the *KVOS, Inc.* decision discloses that the Court had before it only the formal allegation that the matter in controversy exceeded \$3000.00. Plaintiffs’ amended complaint as set out in appellants’ opening brief (pp. 16 and 17) show further facts in support of the allegations concerning the value of the matter in

controversy. This was before the District Court on the verified petition of B. M. Phelps, one of the plaintiffs. The challenge to this allegation was made by appellees in paragraph IV of their consolidated motion (R. 22-24). In support of this challenge the appellees alleged that the value in one instance was \$50.00 and in the other \$500.00. The District Court, therefore, had before it plaintiffs' verified petition alleging the value in excess of \$3000.00 supported by allegations showing that they intend to irrigate 150 acres of land by the use of the waters for which they were claiming title. In challenge of these allegations was defendants-appellees' bare statement that the matter did not exceed \$50.00 to \$500.00. The Court by its order of October 28, 1946 (R. 28-29) thereupon ordered the motion to dismiss submitted on written briefs. No opportunity was given plaintiffs by the District Court to present testimony as to the value of the matter in controversy. In the case of McNutt v. General Motors Acceptance Corporation, the Chief Justice, speaking for the court, recognizes that if the plaintiff's allegations of jurisdictional facts are challenged by his adversaries he must support them by proof. The Court also said:

“... And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.”

Such language places on the District Court either the burden of sustaining plaintiffs' jurisdiction, or allowing plaintiffs in case of challenge an opportunity of proof, or

further in case of no challenge requiring plaintiffs to prove such facts where the court is in doubt. Appellants herein were justified in believing that the Learned Judge in this case, being a long-time resident of the state of Montana, recognized the variation in value between 150 acres of land without water and the value of the same land with the water right and adequate water supply for the irrigation of and production of crops. The court's failure to afford plaintiffs an opportunity to present these facts was not justified by any finding or conclusion contained in his decision of February 8, 1947 (R. 29-37).

We respectfully submit and again urge that the United States District Court for the District of Montana has jurisdiction to hear and determine the issues involved, and that defendants' consolidated motions to dismiss should be overruled.

Respectfully submitted,

SIMMONS & ALLAN,

By Kenneth R. L. Simmons,
Attorneys for Appellants.

Personal service of the within and foregoing brief of appellants and receipt of three copies thereof is hereby acknowledged this day of September, 1947.

H. C. Crippen,
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Norman Hanson.

By
Attorneys for Appellees

